NO. 82-1071

In The Supreme Court of the United States

October Term, 1983

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,
Respondents,

and

PETER JOHNSON, as Administrator of the BONNEVILLE POWER ADMINISTRATION, Department of Energy, and DONALD PAUL HODEL, as Secretary of the DEPARTMENT OF ENERGY, and the UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT PUBLIC POWER COUNCIL

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QUESTION PRESENTED

Did the Ninth Circuit correctly construe the Pacific Northwest Electric Power Planning and Conservation Act ("the Regional Act") as requiring the Bonneville Power Administration to observe longstanding statutory priorities in the sale of nonfirm energy?

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STATEMENT OF THE CASE

The Public Power Council adopts the Statement of the Case as set out in the Brief of Respondents Central Lincoln Peoples' Utility District, *et al.*, and hereby incorporates that Statement by reference.

SUMMARY OF ARGUMENT

The preference rights of consumer-owned utilities in the marketing of federal power are established by the Bonneville Project Act and reaffirmed by the Regional Act. The preference clause is a recognition that publicly owned resources belong to the nation's people and should be distributed directly to the public wherever it is possible to do so. Preference has always been the cornerstone of the federal power marketing system in the Pacific Northwest, and the Regional Act explicitly continues preference for all BPA sales. BPA's decision to grant the direct service industries first access to nonfirm energy is an unreasonable interpretation of the Regional Act because it denies the preference customers' right of priority access to nonfirm energy sales.

The legislative history of the Regional Act is equally clear on the reaffirmance of preference. However, the legislative history relied on by BPA and the DSIs to disgorge the preference customers of their rights is ambiguous and unreliable. Therefore, since the language of the statute is clear and the legislative history supports the reaffirmance of preference, it was reasonable for the lower court to conclude that BPA's sales of nonfirm energy first to the direct service industries violated Congress' intent to preserve preference under the Regional Act.

This court should uphold the express rights of preference agencies by affirming the decision below. The Ninth Circuit has interpreted preference consistently with the rulings of other courts regarding similar preference provisions under Federal law. In light of the strong Congressional policy in favor of the preference clause, and of the vital role which preference plays in spreading the benefits of publicly owned facilities to public entities, it is reasonable to conclude that,

had Congress intended to abrogate the preference rights of public agencies, it would have done so expressly instead of in an ambiguous portion of legislative history. Such a drastic change in Congressional policy requires explicit Congressional direction.

ARGUMENT

I.

RESPONDENT PUBLIC POWER COUNCIL IS IN A UNIQUE POSITION TO COMMENT ON THE PURPOSE AND EFFECT OF THE REGIONAL ACT.

A. The Public Power Council Represents the Common Interests of the Pacific Northwest's Consumer-Owned Utilities.

The Public Power Council was formed in 1966 to represent the common interests of the Pacific Northwest's consumer-owned electric utilities on power supply, planning and wholesale price matters. The Public Power Council's members include public and peoples' utility districts, municipally owned electric systems, and rural electric cooperatives. Twenty-two members have generation facilities which supply a part of their own needs; they purchase the remainder from the Bonneville Power Administration ("BPA"). The other members are entirely dependent on BPA for the power they serve to their consumers.

The common thread binding Public Power Council members together is their status as preference customers of BPA. Congress has declared it a federal policy since 1937 to give these utilities priority access to federal power.[1] The goal of this policy is to spread the benefits of the publicly owned federal dams as directly as possible to the consuming public. This goal is accomplished by serving all the needs of the consumer-owned utilities first. This goal will be lost if BPA is allowed to reverse the priority of access to federal power, as it attempts to do in this case, by selling nonfirm energy to its direct service industrial (DSI) customers ahead of the preference customers.

[1] 16 U.S.C. § 832c(a)

B. Preference Customer Operations.

Consumer-owned utilities have many uses for nonfirm power which are vital to meeting their power supply needs. For example, due to differences between hydraulic conditions on the federal hydroelectric system and the systems of the generating preference customers, the preference customers often find their reservoirs depleted at a time when BPA has nonfirm energy available. At such times, preference customers purchase nonfirm energy from BPA to restore their reservoirs to proper levels.[2]

Due to the rising costs of electricity, many farmers in the region can no longer afford to irrigate their lands. BPA recently began making nonfirm energy available to consumer-owned utilities for resale to irrigators, allowing affordable irrigation for what would otherwise be unproductive land.[3]

Furthermore, industries served by consumer-owned utilities can use nonfirm energy in place of oil or natural gas for their industrial processes. By purchasing nonfirm energy for resale to such industries, the consumer-owned utilities contribute to the economic stimulation of the region and help conserve nonrenewable energy sources as well.[4]

If BPA is allowed to reverse the priority of access to federal nonfirm energy, all these benefits could be threatened or lost. The benefits of public property would go first to the nonpreference customer DSIs, contrary to Congressional mandate.

C. The Public Power Council Played a Direct Role in Drafting and Securing Passage of the Regional Act.

Faced with rate disparity among consumers of various private and public utilities, with a potential flood of litigation concerning the allocation of cheap federal power, and with

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[2] *See*, Respondents' Statement of the Case.

[3] *See*, BPA Notice of Final Action, 48 Fed. Reg. 38533 (1983).

[4] *See*, BPA Proposed Policy, 48 Fed. Reg. 33518 (1983).

BPA's inability to continue serving its preference customers' total needs, Congress enacted the Regional Act in order to achieve a regional solution to these power supply and allocation problems. Creating the need for such legislation was the fact that BPA lacked the authority to acquire resources under the Bonneville Project Act.[5] BPA's inability to acquire sufficient resources to serve its customers' needs became so critical that in 1976 BPA notified its preference customers that it could not assure them enough federal power to meet their load growth needs after 1983. Regional power industry groups, including the Public Power Council, began to draft federal legislation which eventually resulted in the enactment of the Regional Act.

Drafting workable, acceptable legislation proved to be a formidable task. The first attempt at a regional solution was S. 2080, introduced by Senator Henry Jackson in 1977. The bill failed due to opposition from the consumer-owned utilities which arose because of the bill's ambiguous effect on their priority rights.

Accordingly, in 1978, Senator Jackson introduced new legislation, S. 3418. The Public Power Council again pointed out the legislation's failure to address the concerns of BPA's preference customers. In April 1979, Senator Jackson reintroduced the legislation as S. 885.

The Public Power Council did not support the passage of S. 885. Therefore, the Public Power Council and other power industry groups drafted a revised version of S. 885 which firmly protected the priority access to federal power of the consumer-owned utilities. The Public Power Council's amendments were incorporated into the House version of the Bill which was signed into law on December 5, 1980.[6]

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[5] 16 U.S.C. §§ 832-832l

[6] "The bill incorporates the 'preference clause' protections recommended by the Northwest Public Power Council (sic), solving another delicate problem and heading off potential opposition from the national public power organizations." 125 Cong. Rec. S11592 (daily ed., August 3, 1979), (remarks of Senator Hatfield).

II.

THE PRIORITY RIGHTS OF THE CONSUMER-OWNED UTILITIES ARE EXPRESSLY PROTECTED BY THE LANGUAGE OF THE REGIONAL ACT AND ITS LEGISLATIVE HISTORY.

A. The Consumer-Owned Utilities Had First Right of Access to BPA's Nonfirm Power Prior to Passage of the Regional Act.

1. The Statutory Framework.

The Bonneville Project Act of 1937[7] created the Bonneville Power Administration and established the priorities it was to follow in selling federal electrical power. Section 4(a) of that Act states:

> In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers, *the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives.*[8] (emphasis added)

The BPA Administrator also markets power from federal hydroelectric projects under the Flood Control Act of 1944[9] and the Federal Reclamation Act of 1939.[10] The rationale for these preference clauses is to pass the benefits of these publicly owned resources directly to the consuming public. Establishing a first right of access to federal power for the consumer-owned utilities guarantees that the benefits will pass as Congress intended. The preference clause of the Bonneville Project Act insures that public benefits will pass to the public and not be monopolized by private industries, as had happened earlier with the Niagara Falls project.[11]

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[7] 16 U.S.C. § 832-832l

[8] 16 U.S.C. § 832c(a).

[9] 16 U.S.C. § 825s (1976) ("[p]reference in the sale of such power and energy shall be given to public bodies and cooperatives").

[10] 43 U.S.C. § 485h(c) (1976) (preference shall be given to municipalities).

[11] *See*, Section 2, Respondents' Statement of the Case.

2. Priority Access to Consumer-Owned Utilities Has Historically Applied to Nonfirm Power Sales.

In 1956, the Regional Solicitor for the Department of the Interior reaffirmed that the priority requirements of the Bonneville Project Act and other federal statutes applied to nonfirm energy:

> The Bonneville Project Act requires that the Administrator shall at all times, in disposing of electric energy generated at projects subject to the Act, give preference and priority to public bodies and cooperatives. Section 4(a). *This applies to all electric energy generated at the projects, both firm and secondary. Accordingly, the same legal requirements will govern the sale of by-product secondary as now govern sales of firm power.* If public bodies or cooperatives make application to purchase the energy under the new pricing policy inaugurated, their needs will have to be met first. Regional Solicitor's Opinion, March 5, 1956. (emphasis added)

BPA has always followed this directive in its operations. In the Environmental Impact Statement published in December 1980, describing its role in the Pacific Northwest energy supply and its participation in the Hydro-Thermal Power Program ("Role EIS"), BPA states that it allocated nonfirm energy first to public bodies and cooperatives; other non-firm service requests were met, if at all, only after those of consumer-owned utilities.[12] The DSI petitioners and BPA did not dispute below that prior to the Regional Act the DSIs received nonfirm power only *after* the preference customer nonfirm needs were met.[13]

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[12] BPA, U.S. Department of Energy, Final Environmental Impact Statement on the Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System ("Role EIS") (DOE/EIS-0066) IV-71 (Dec. 1980).

[13] *Central Lincoln Peoples' Utility District v. Johnson*, 686 F.2d 708, 712, n.4.

B. The Regional Act Expressly Reaffirms the Priority Rights of Consumer-Owned Utilities.

1. The Statutory Language Preserves Rights of Preference Customers.

Section 5(a) of the Regional Act reaffirms BPA's obligation to observe existing statutory priorities in all its power sales:

> "*All power sales under this Act shall be subject at all times* to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. § 832 and following) and, in particular, sections 4 and 5 thereof. Such sales shall be at rates established pursuant to section 7."[14] (emphasis added).

In addition to the clear command of Section 5(a), Congress added a blanket savings provision in Section 10(c):

> "*Nothing in this Act shall alter, diminish, abridge, or otherwise affect* the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.[15] (emphasis added).

Congress included Sections 5(a) and 10(c) to preserve the preference and priority rights of consumer-owned utilities as they existed prior to the Act; Congress intended that no provision of the Act interfere with that preference and priority. The Regional Act's preference provisions are not limited to firm power. They are not limited in geographic scope. They are not limited by other provisions of the Regional Act. Sections 5(a) and 10(c) subject "all sales" to the allocation priorities mandated by the preference clauses of other federal statutes.

Finally, Sections 5(a) and 10(c) preclude any other provision of the Regional Act from affecting those allocations in any way. As the Ninth Circuit held, Sections 5(a) and 10(c) direct that the consumer-owned utilities continue to receive priority access to nonfirm power.[16] BPA violated that direction when it reversed the priority of access in the DSI contracts challenged here.

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[14] 16 U.S.C. § 839c(a).

[15] 16 U.S.C. § 839g(c).

[16] *Central Lincoln*, at 713.

2. The Legislative History Further Demonstrates Congress' Concern That Preference Be Protected.

Early versions of the regional legislation[17] did not include any preference protections similar to Sections 5(a) and 10(c) of the Regional Act. Representatives of consumer-owned utilities testified that, while Congress might not intend such bills to affect preference rights, the absence of explicit protections would lead to that result.[18]

Congress specifically added Sections 5(a) and 10(c) to the Regional Act to make sure that preference would not be subordinated to, nor the priority of allocations reversed by, the rights of DSIs or investor-owned utilities under Sections 5(b), 5(c) or 5(d). During the hearings, Senator Henry Jackson, one of the principal sponsors of the legislation, committed himself to address the concerns of BPA's preference customers:

> You have raised a number of points that are of obvious concern to me and the committee, especially and specifically the point on preference and the need to clarify any possible misunderstandings that might occur in connection with our effort to bring about an equitable adjustment in the residential rates.
>
> *And we will certainly have additional language that will make clear the continuity of the preference provision in the law.* We will be working with your people on these matters.[19]

Senator Jackson carried out this commitment by asking the Public Power Council to draft amendments that would protect preference. The Public Power Council drafted amendments that ultimately became Sections 5(a) and 10(c) of the Regional Act. In the 96th Congress, Senator Jackson offered the

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[17] S. 2080 and H.R. 9020, 95th Cong., 1st Sess. (1977); S. 2080 and S. 3418, 95th Cong., 2d Sess. (1978)

[18] *Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S. 2080 and 3418 Before the Senate Committee on Energy and Natural Resources*, 95th Cong., 2d Sess. 1053; 1058, 1064; 1069; 1079; 1103-04; 1112.

[19] *Id.*, at 1062.

amendments and explained them during the Senate debate on S. 885:

> During consideration of S. 2080 and S. 3418 paramount concern was expressed within the region and from other parts of the Nation concerning the impact of the legislation on historic Federal power marketing policies which grant preferential access to federally marketed power to publicly and cooperatively owned utilities. Under S. 3418 all sales of power by the Bonneville Power Administration were subject to the preference clause of the Bonneville Project Act.
>
> However, public agencies expressed the view that language should be added to the bill which would specifically delineate that point. Accordingly, I asked the Public Power Council which represents all publicly and cooperatively owned utilities in the Northwest to draft amendments which would satisfy concerns of preference customers and to formally transmit those amendments to me as chairman of the Senate Energy Committee.
>
> Over a period of several months the Public Power Council worked out a series of amendments to address their concerns. These amendments primarily address the preference clause but they relate to other issues as well. They were formally transmitted to me in February of this year. Because I specifically requested that the Public Power Council prepare these proposals I am introducing the amendments by request of the Public Power Council. I ask that they be printed and referred to the committee for consideration.[20]

Two committees of the House of Representatives considered the bill that ultimately became the Regional Act. This bill was a House substitute for S. 885 and included both Public Power Council preference amendments as Section 5(a) and 10(c). Both House committees expressed an unmistakable intent that the Regional Act not affect or diminish preference

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[20] 125 Cong. Rec. S3998 (daily ed. April 5, 1979) (Remarks of Senator Jackson). *See also*, S. Rep. No. 96-272, 96th Cong., 1st Sess., pages 15, 20, 21, 26 (corrected by 125 Cong. Rec. 11593), 35 (1979).

in any way. The House Committee on Interior and Insular Affairs stated:

> It is not, however, a purpose of this legislation to interfere in any way with, or modify the statutory rights of preference customers either within or without the region.[21]

The House Committee on Interstate and Foreign Commerce expressed the same intent:

> Concerns have been expressed that S. 885 might be construed to change the meaning or application of preference in the Northwest, and by precedent, nationally. *However, the intention of this Committee is clear. The Committee does not want to undo nearly 80 years of history or establish any precedent. Specific provisions incorporated in the Committee amendment are designed to protect the entitlement of both existing and new preference customers to the full Federal base system.* These provisions seek to protect preference as to both supply and price.[22]

Before the Regional Act became law, BPA twice acknowledged that the effect of the Act would be to leave preference intact. In his testimony before the House Committee on Interstate and Foreign Commerce, the BPA Administrator made it clear that public bodies and cooperatives were to retain first call on all power generated by the federal base system resources.[23] Further, the Role EIS, published four days before the Regional Act became law, included an analysis of the legislation as one of the alternative roles under study.[24] That analysis concluded that one key element of the pending

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[21] H.R. Rep. No. 96-976, Part II, 96th Cong. 2d Sess. 26 (1980). *See also, Id.* 34, 36, 57.

[22] H.R. Rep. No. 96-976, Part I, 96th Cong. 2d Sess. 34 (1980). *See also, Id.* 24, 27, 33-35, 59, 74.

[23] *Pacific Northwest Electric Power Planning; Hearings on H.R. 3508 and 4159 Before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 251 (1979).*

[24] Role EIS, I-33 to I-37.

legislation was the preservation of preference unchanged.[25] The Role EIS also discusses nonfirm energy sales under the pending regional legislation, but it makes no mention of any change in the priority of those sales.[26]

The legislative history reflects the clear intention of Congress that Sections 5(a) and 10(c) reaffirm the preference rights of consumer-owned utilities to all sales of federal power. Since the Regional Act expressly preserves existing priorities, including the priority of access to nonfirm energy, BPA violated the Act by contracting with the DSIs to serve them nonfirm energy before the nonfirm was offered to preference customers.

III.

THE HOLDING BELOW IS CONSISTENT WITH CASES INTERPRETING SIMILAR PREFERENCE CLAUSES THAT ARE APPLICABLE TO OTHER POWER MARKETING AGENCIES.

A. Preference is to be Strictly Construed.

Through the preference mechanism, Congress established specific priorities to govern the allocation of federally generated electric power. The court below strictly construed the preference provisions of the Bonneville Project Act and the Regional Power Act in a manner consistent with prior decisions regarding similar clauses.[27]

The preference clause in the Federal Reclamation Act,[28] has been construed as granting consumer-owned utilities priority access to thermal as well as hydroelectric power. *Arizona Power Pooling Association v. Morton*, 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). The Court in *Arizona* also interpreted the phrase "surplus power", as used in that Act, to include any presently available electricity

[25] *Id.*, I-36, III-53; *see also*, IV-334.

[26] *Id.*, IV-336.

[27] *Central Lincoln*, at 711.

[28] 43 U.S.C. § 485h(c)

which must be allocated according to preference. Thus, the court held that since preference applies to the allocation of all power, contracts that allocated surplus thermal power to non-preference customers first, were contrary to the preference clause and therefore invalid.

Significantly, the court also held that the annual appropriation by Congress to the Central Arizona Project did not constitute approval of the Secretary's abrogation of the preference clause.[29] Also, the Secretary's discretion to devise the "most feasible plan" did not authorize the Secretary to violate the preference clause.[30] Exceptions to preference must be clear and unambiguous.

Arizona is consistent with the present case because in both instances the preference clause was strictly construed to protect the priority access rights to federal power of the consumer-owned utilities. Further, the court in both cases rejected any interpretation of preference which undermined the intent of Congress that the benefits of federally owned property should first go to public entities. As the court in *Central Lincoln* states "[a]ny modification of the preference, in view of its long history and clear reaffirmation in the Act, should be explicit."[31]

In a more recent decision, the Ninth Circuit again reaffirmed the strict application of preference, rejecting an administrative attempt to avoid the statutory allocation of federal power under the Federal Reclamation Act by selling first to a non-preference customer under the guise of "banking." *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978), *cert. denied*, 439 U.S. 859 (1978). In *City of Santa Clara*, the City, a preference customer, received electricity from the Central Valley Project on a withdrawable basis. As the demands of other preference customers grew, the City of Santa Clara's service was reduced. However, at the same time

[29] *Arizona*, at 726.

[30] *Id.*, at 728.

[31] *Central Lincoln*, at 711.

sales were being made to Pacific Gas & Electric Company (PG&E), a non-preference customer, of substantially greater amounts of power than the City consumed.

The government argued that there was no violation of the preference clause because the power sold to PG&E was "banked" and could be repurchased by the government in the future to maintain a stable power supply for preference customers with non-withdrawable contracts.[32]

The court rejected the "banking" terminology as a means of circumventing preference and held that the transaction amounted to a sale of electricity to a non-preference customer in violation of the preference clause:

> Congress intended public utilities, wherever possible, to benefit from the sale of low cost federal power. An arrangement which enables a non-preference entity to reap a benefit which Congress sought to bestow upon public entities, even temporarily, flies in the face of that intent.[33]

B. The Court Below Correctly Distinguished Authorities Relied On by Petitioners.

1. Cases

The Petitioners rely on several authorities to support the proposition that preference provisions can be modified without Congressional approval. For example, Petitioners rely on *Volunteer Electric Cooperative v. TVA*, 139 F. Supp. 22 (1954), aff'd mem. 231 F.2d 446 (6th Cir. 1956) for the proposition that an agency can limit the scope of preference without express congressional approval.[34] In *Volunteer*, the Court upheld a contract whereby the Tennessee Valley Authority (TVA) sold federal power directly to large industries within the service area of Volunteer, a preference customer. Volunteer challenged the direct sale of federal power to a large paper

[32] *City of Santa Clara*, at 669.

[33] *Id.*, at 671.

[34] Petitioners' Brief, p. 43.

industry that moved into the area as a violation of preference. Volunteer had requested that TVA sell it power for resale to the paper mill. The Court held that no violation of preference arose because the issue was a matter of who would serve a new industrial customer rather than who had a right of prior access to federal power. The Court noted that such direct sales to industrial customers had been expressly ratified by a Congressional committee.[35]

The instant case, however, involves the issue of whether consumer-owned utilities will retain their priority to access to low cost power for their existing consumers rather than the issue of *who* will serve a new consumer. Further, the legislative history of the Regional Act is devoid of any explicit Congressional approval of BPA's reversal of priorities for the sale of nonfirm energy. As the Court noted in *Central Lincoln*, there was no clear indication in the legislative history of the Regional Act that Congress intended to override the "explicit preference mandate."[36]

The Petitioners also rely on *City of Anaheim v. Duncan*, 658 F.2d 1326 (9th Cir. 1981), for the proposition that an agency may commit federal power to non-preference customers by contract without regard for statutory allocations.[37] In *City of Anaheim*, the City, a preference customer, challenged contracts for the sale of electricity from the Central Arizona Project to private non-preference utilities. The court upheld the contracts for reasons independent of the preference clause. First, the court noted that the primary purpose of the Federal Reclamation Act was to provide reclamation and irrigation, not power, and the challenged contracts were necessary to maintain the efficiency of the irrigation system.[38] Second, the contracts were of the relatively short duration of six years.[39] Third, the cities did not offer at that

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[35] *Volunteer Electric Cooperative v. TVA*, 139 F. Supp. 26 (1954).

[36] *Central Lincoln*, at 713-714.

[37] Petitioners' Brief, p. 22.

[38] *City of Anaheim*, at 1330.

[39] *Id.*, at 1331.

time to purchase power nor did they indicate that they would need the power in the future.[40]

It was the necessity for the development of an efficient irrigation system and the special factors concerning the contracts that led the court in *Anaheim* to reject challenges to the short term contracts. The court indicated, however, that long term contracts without such unique circumstances would violate preference and therefore be invalid.[41]

In contrast, the primary function of the Bonneville Power Administration is to provide low cost electricity to consumers in the region.[42] Further, the contracts BPA offered to the DSIs would have required BPA to sell nonfirm energy to the DSIs over the twenty year life of the contract, in the face of competing demands from the preference customers, in contrast to the six year contracts in *City of Anaheim*. Finally, the preference customers in the instant case have a need for the nonfirm energy, unlike the preference customers in *City of Anaheim*, which had no need for the power.

2. Statutes.

Petitioners also assert that the language of certain Federal power marketing statutes commit power to non-preference entities without an explicit exception to preference.[43] While it may be literally true that these statutes do not say, "preference is limited in the following manner ...", they all do contain clear and unambiguous allocations of specific amounts of power. Not one statute relied on by Petitioners "allocates" *power* by requiring a *load* to serve as a reserve, as the DSIs and BPA argue the Regional Act does. The explicitness of the allocations found in these other statutes serves to reinforce the point that Congress limits preference only by such explicit allocations. Merely requiring a load to function

[40] *Id.*, at 1329.

[41] *Id.*, at 1331.

[42] 16 U.S.C. § 832c(a).

[43] Petitioners' brief, pp. 41-42.

as a reserve does not rise to the level of an irrevocable allocation of power, as the Court below noted.[44]

In other statutes where similar preference provisions have been limited by superseding statutes the language in each case clearly indicates that a fixed amount of power is to be allocated to entities other than those categorized as preference customers. For example, the Niagara Redevelopment Act of 1957[45] expressly provides that fifty percent of the energy output of the Project must be reserved for preference customers. While the remaining fifty percent may also be marketed to preference customers, the perimeters of the allocation are defined in the statute.

Similarly, the Northwest Power Preference Act[46] restricts the preference clause of the Bonneville Project Act by stating that those preference customers outside the Northwest region may not receive electricity unless the energy requirements within the region have been fulfilled. Again the language here clearly defines the exception to preference by confining it to certain geographical boundaries.

The other statutes cited by the Petitioners also contain similar language that expressly defines the allocation of power in lieu of preference. The Hungry Horse Dam Act of 1944[47] establishes a geographical preference, and the Boulder Canyon Project Act[48] explicitly permits renewal of existing contracts with non preference entities.

The provisions in these Acts achieve a level of clarity sufficient to constitute an unambiguous direction to the agency involved. Such perspicuity is not present in the interpretation of the Regional Act which the Petitioners urge upon the court.

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[44] *Central Lincoln*, at 712-713.

[45] 16 U.S.C. § 836(b)(1).

[46] 16 U.S.C. § 837b (1976).

[47] 43 U.S.C. § 593a.

[48] 43 U.S.C. § 617b(b).

IV.

OTHER ARGUMENTS ADVANCED BY THE DSIs AND BPA DO NOT JUSTIFY REVERSING THE LONGSTANDING PRIORITIES DIRECTED BY CONGRESS.

A. Section 5(g)(7) of the Regional Act Does Not Authorize the Administrator to Write Contract Terms That Violate Statutory Rights of BPA's Preference Customers.

Section 5(g)(7) of the Regional Act provides, "The Administrator shall be deemed to have sufficient resources for the purpose of entering into the initial contracts specified in paragraph 1(A) through (D)." 16 U.S.C. 839c(g)(7). The DSIs argue that Congress wrote this provision deliberately to prevent any preference challenge to the initial contracts. In support of this proposition, Petitioners cite the Report of the House Committee on Interstate and Foreign Commerce.[49]

The actual language of the Report, however, does not support the DSIs' assertion.[50] In fact, the language of that Report, when stripped of the additional words supplied by the DSIs in their quotations, shows that Section 5(g)(7) was intended to prevent a legal challenge to the offering of the contracts on the ground that the Administrator did not at that moment have sufficient resources to meet those loads under the contracts. Its purpose was to allow the Administrator time to exercise his new authority to acquire resources. The complete text of the pertinent paragraph of the Report reads:

> Section 5(g)(7) is intended to assure that a challenge (on the basis that the Administrator lacks legal authority on account of insufficient power resources) to the initial contracts required to be offered under this Act will not be sustained. In obtaining new resources, however, BPA must do so in accordance with this bill. This provision does not override any other provision of this bill. To the extent that additional power is required to meet these initial contract commitments, BPA can use its existing

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[49] H.R. Rep. No. 96-976, Part I, 96th Cong., 2d Sess. 64 (1980).

[50] *See* paragraph F, *infra.*, for a further discussion of incorrect citations in the DSI brief.

short-term authority as well as its authority under this Act.[51]

Two points should be noted about this paragraph. First, it says nothing about preference nor makes reference to changing the priorities in the allocations of power for sale. Second, the third sentence specifically states, "This provision does not override any other provision of this bill." Provisions that would be covered by this statement include Sections 5(a) and 10(c), which guarantee that preference and priority in the sale of power will remain unchanged by the Regional Act. Significantly, the DSIs failed to quote this sentence.

Finally, the DSI argument makes an illogical connection between Section 5(g)(7) and the preference issue presented in this case. Section 5(g)(7) protects only the act of offering new long term contracts from a claim that the Administrator was selling something he did not have. The consumer-owned utilities have not claimed that the Administrator cannot sell nonfirm energy to the DSIs, but only that the Administrator cannot reverse the priorities under which that energy is sold. The dispute in this case turns on four specific sections of the new DSI contract wherein the Administrator binds himself to reverse those priorities. Section 5(g)(7) does not protect specific contract terms. If it did, the Administrator could make preference a dead letter in the Northwest simply by contracting with non-preference entities. This is clearly an absurd result. The obvious conclusion is that Section 5(g)(7) was not intended to override the explicit preference mandate of the Bonneville Project Act and the Regional Act.

B. Section 5(f) of the Regional Act Does Not Limit the Application of Preference to Surplus Power.

Section 5(f) of the Regional Act[52] authorizes the Administrator to dispose of power that is in excess of his contractual commitments, in accordance with existing law. The House Committee on Interior and Insular Affairs states that "Sec-

[51] H.R. Rep. No. 96-976, 96th Cong., Part I, 2d Sess. 64 (1980).

[52] 16 U.S.C. § 839c(f).

tion 5(f) is a technical provision to insure that BPA has the ability to dispose of any temporary or incidentally surplus power under this Act and other laws applicable to BPA sales."[53]

The DSIs contend that only the power sold under this section is subject to preference rights of public utilities.[54] They also argue that this is the only statutory provision under which preference customers purchase nonfirm energy.[55]

These arguments make a mockery of Congress' plain intent, expressed in the language of the Regional Act and other preference statutes. First, preference attaches to all federal power as it is generated; preference does not depend on the status of BPA's load/resource balance.[56] The DSIs' argument leads to the absurd result that the allocation priorities directed by Congress would only apply if there is so much power available that it does not need to be allocated.

Second, the DSIs' argument ignores the plain meaning of Section 5(a). That section commands, *"All power sales under this Act shall be subject at all times* to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. § 832 and following) and, in particular, Sections 4 and 5 thereof."[57] All power sales are subject to the priority of access given to consumer-owned utilities, not just sales of excess power. BPA's sales are subject at all times to those priorities, not just when BPA has more power than it needs.

Third, the DSIs' argument ignores the explicit command of Section 10(c) of the Regional Act. That section directs, *"Nothing in this Act* shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which

[53] H.R. Rep. No. 96-976, Part II, 96th Cong. 2d Sess. 49.

[54] Petitioners' Brief, page 27.

[55] Petitioners' Brief, page 27, fn. 83.

[56] *See,* Bonneville Project Act, 16 U.S.C. § 832c(a); Reclamation Project Act of 1939, 43 U.S.C. § 485h(c); Flood Control Act of 1944, 16 U.S.C. § 825s; *Arizona Power Pooling Association v. Morton, supra.*

[57] 16 U.S. § 839c(a) (emphasis added).

public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power."[58] The Federal laws cited direct that public bodies and cooperatives receive priority access to all federally generated power covered by that law, which includes all the power sold by BPA. The DSIs' argument would make Section 10(c) meaningless for Pacific Northwest preference customers.

Finally, Petitioners' interpretation of Section 5(f) confuses "surplus" power with "nonfirm" power. Power can be "nonfirm" if it is produced by streamflows above the levels used in planning system capability, without regard for whether it is "surplus" to BPA's needs. Section 5(f) is a limited provision allowing the Administrator to dispose of whatever power, firm or nonfirm, is in excess of his loads, so as to ease the burden on his ratepayers. It does not in any way change the priorities for the Administrator's sales, because the priorities attach to the power as it is generated. Naturally the power sold under Section 5(f) is subject to preference, but so is all other power sold by BPA. The DSIs' argument ignores this simple fact.

C. DSI Statements Regarding Preference Customer Uses of Nonfirm Energy are Incomplete, Inaccurate and Misleading.

The DSIs state that, if the correct priorities are restored, the consumer-owned utilities will use the nonfirm energy "to increase their sales to other utilities,"[59] "arbitrage" the power,[60] and reap "windfall gains" thereby.[61] The DSIs, however, ignore other uses of nonfirm energy being made by consumer-owned utilities and their customers. Under policies announced by BPA and through contracts with the consumer-owned utilities, industrial customers on the preference utility systems are able to take advantage of the lower

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[58] 16 U.S.C. § 839 (g)(c) (emphasis added).

[59] Petitioners' Brief, p. 47.

[60] Petitioners' Brief, p. 13.

[61] Petitioners' Brief, p. 49, fn. 122.

cost of nonfirm energy to displace fossil fuels used in their industrial processes. For example, several paper companies are now using nonfirm energy when available, instead of oil or natural gas, to make low pressure steam for use in their mills.[62]

Under similar policies and contracts, farmers served by preference utilities can take advantage of nonfirm energy to reduce the costs of irrigating their land. As BPA noted, the high cost of energy for irrigation has forced many farmers to withdraw some land from production; these nonfirm sales are meant to address that problem.[63]

The Pacific Northwest Electric Power and Conservation Planning Council established under Section 4 of the Regional Act[64] specifically endorsed both types of sales as a way to improve BPA's revenue flow and preserve the benefits of inexpensive nonfirm energy for the Pacific Northwest.[65]

Both these programs depend on the preservation of statutorily mandated priorities to nonfirm energy. If the consumer-owned utilities lose their first right of access to this energy, their industrial and irrigation consumers will be forced to turn to more expensive energy sources whenever an insufficient amount of nonfirm energy is available to serve more than the DSI top quartile. The region would lose the benefits of fossil fuel displacement and increased farm production that these programs were meant to provide.

D. Nonfirm Service to the DSI Top Quartile Provides No Unique Operational or Rate Benefits to the Pacific Northwest.

The DSIs claim that, if the statutory priorities are observed, the region will lose "operating efficiencies and increased revenues" that are claimed to flow from nonfirm

[62] BPA Proposed Policy, 48 Fed. Reg. 33518. (1983).

[63] BPA Notice of Final Action, 48 Fed. Reg. 38533 (1983).

[64] 16 U.S.C. § 839b.

[65] 1983 Northwest Conservation and Electric Power Plan, Volume I, pp. 5-12, adopted April 27, 1983. *See,* Notice of Final Regional Conservation and Electric Power Plan, 48 Fed. Reg. 24493 (1983).

service to the DSI top quartile.[66] In fact, no such benefits exist, as BPA itself admits.

In their comments on the Draft Role EIS, the DSIs complained that BPA did not adequately describe the same supposed operational and rate benefits.[67] BPA responded that the high load factor of the DSI plants provided no unique operational benefits to the BPA system that could not be obtained in other ways:

> BPA studies indicate that in the unlikely event that the DSI load disappears from the region, steps can be taken through modification of our [extra-regional] power sales contracts (which by their nature of delivering capacity during the daytime and receiving energy back at night force greater fluctuations in our loads) to mitigate the impact of domestic load fluctuations.[68]

BPA also responded to the DSIs' claim that selling nonfirm energy to the DSIs somehow made power cheaper for everyone else:

> It is not true that use of secondary energy to meet the top quartile industrial loads has reduced the cost of power to Bonneville's other customers. In the cost-of-service study prepared for the 1979 wholesale rate filing, costs were allocated to the portion of the top quartile DSI load that BPA anticipates it will meet. Therefore, revenues received from sales of power to meet DSI top quartile loads should cover costs incurred in serving the loads.[69]

The DSI argument represents an attempt to frighten the Court into seeing harms associated with the correct priorities of access to nonfirm energy that do not exist. The Court should not be misled.

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[66] Petitioners' Brief, p. 46; *see also*, p. 10

[67] Role EIS (Attachment A), pp. A-26, A-27.

[68] Role EIS (Attachment B), p. B-28.

[69] Role EIS (Attachment B), pp. B-29 - B-30.

E. Priorities of Allocation Do No Depend on BPA's Rights to Restrict DSI Loads.

The DSIs argue that "it was only through the exercise of BPA's restriction rights that preference utilities secured this [nonfirm] power under the 1975 [DSI] contracts."[70] They claim that because the Ninth Circuit allegedly misunderstood this, the Ninth Circuit did not see that the reduction the DSIs describe in BPA's restriction rights amounted to a guarantee of access to nonfirm energy.

The DSIs confuse restrictions with allocations. Contrary to their assertions, the Ninth Circuit understood the point quite well. The allocation comes first, and that allocation must follow the priority given to consumer-owned utilities. The Regional Act did not change the order in which BPA's customers line up to receive nonfirm energy. As the Ninth Circuit observed, "It is meaningless to speak of interrupting the flow of power that has not yet been allocated. No customer has any expectation of receiving any nonfirm power until BPA allocates it."[71]

F. DSI and BPA Arguments Are In Part Based on Incomplete Quotations and Misleading References.

Numerous DSI and BPA arguments contain incomplete quotations, quotations taken out of context, quotations whose meaning has been changed by insertion of additional phrases, and references that do not support the propositions they are cited for. This part of our brief lists the more egregious of such instances, together with the necessary corrections. Others may also exist.

1. a. The DSIs quote the Report of the House Committee on Interior and Insular Affairs as saying:

> *"The Committee understands and intends that ... [a]pproximately 25 percent of the DSI load [the first quartile] is to be treated as firm for purposes of resource operation and will provide an operating reserve that may*

[70] Petitioners' Brief, at 39.

[71] *Central Lincoln*, at 712.

> *be restricted by BPA at any time in order to protect the Administrator's firm loads within the region and for any reason, including low or critical streamflow conditions and unanticipated growth of regional firm loads.* An additional 25 percent of the DSI load [the second quartile] will be treated as a firm load for both planning and operating purposes and will provide a planning reserve to protect the Administrator's firm loads against the delayed completion or unexpectedly poor performance of regional generating resources or conservation measures implemented or acquired by BPA."[72]

Thus Petitioners argue that this passage directs BPA to adopt a certain theory of top quartile operation in the DSI contract.

b. This is not the way the Committee Report actually reads. The ellipsis in the first sentence hides the omission of an entire paragraph. The House Interior Committee Report actually states:

> Sales to existing DSIs are required under this subsection to continue to provide a portion of BPA's power system reserves. The Committee understands and intends that the new DSI contracts under the legislation will provide capacity reserves similar to those provided in the present contracts. Fifty per cent of the then operating DSI load may be restricted for a period of up to two hours to provide a forced outage or peaking power reserve. One hundered [sic] per cent of the DSI load may be restricted by BPA for up to five minutes whenever frequency problems arise on the regional grid.
>
> The DSIs will also provide two types of energy reserves. Approximately 25 percent of the DSI loads is to be treated as a firm load for purposes of resource operation and will provide an operating reserve that may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region and for any reason, including low or critical streamflow conditions and unanticipated growth of regional firm loads. An additional 25 percent of

[72] Petitioners' Brief, p. 30 (Bracketed language and emphasis in Petitioner's Brief).

> the DSI load will be treated as a firm load for both planning and operating purposes and will provide a planning reserve to protect the Administrator's firm loads against the delayed completion or unexpectedly poor performance of regional generating resources or conservation measures implemented or acquired by BPA.[73]

The Committee thus "understood and intended" that the new DSI contracts would provide *capacity* reserves similar to those provided in the pre-Act contracts. This portion was omitted from the quotation in the DSI briefs. The remainder of the DSI quotation deals with *energy* reserves, an entirely different matter, which the Committee discussed in a separate paragraph.

2. a. The DSIs cite S. Rep. 96-272, 96th Cong. 20 Sess. 59, as supporting a projection of BPA service to between 85 and 96 percent of the total DSI load.[74] However, Petitioners cite the same passage to support a projection of service to 96% of the total DSI load.[75]

b. The passage referred to in the Senate Report specifies a projected range of service from 85 to 96 percent. Furthermore, the context of the entire section in the Report makes it clear that the projection is based on historical patterns of service, not on any change in the priority of access to nonfirm energy.

3. a. The DSIs purport to set out the operation of preference rules under the Bonneville Project Act.[76] They cite only Sections 4(b) and 5(a) of that Act,[77] and state that "preference rules only governed BPA's allocation of power not otherwise lawfully committed by contract."

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[73] H.R. Rep. No. 96-976, Part II, 96th Cong. 2d Sess. 48.

[74] Petitioners' Brief, p. 32

[75] Petitioners' Brief, p. 9

[76] Petitioners' Brief, pp. 13-14.

[77] 16 U.S.C. §§ 832c(b) and 832d(a)

b. The DSIs failed to cite Section 4(a) of the Bonneville Project Act which states:

> In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural customers, *the Administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives.*[78]

This section is a blanket application of preference to all BPA power sales under the Bonneville Project Act, with no exceptions. It has one effect not noted by the DSIs; BPA may not enter into contracts that violate preference and then claim that the existence of the contract protects the violation.

4. a. The DSIs repeatedly argue that Section 5(g)(7) of the Regional Act protects their contracts from challenge on preference grounds.[79] They cite the House Committee on Interstate and Foreign Commerce Report, quoting it twice as follows:

> Congress's purpose in enacting this legal fiction was made clear: it was "intended to ensure that a challenge [on preference grounds] to the intial contracts required to be offered under this Act *will not be sustained*. House Commerce Report, at 64.[80]

b. First, the DSI quotation omits two lines of text without noting the omission. Second, the substitution of the bracketed phrase "on preference grounds" for the omitted lines completely changes the meaning of the cited paragraph. The paragraph correctly reads:

> Section 5(g)(7) is intended to ensure that a challenge (on the basis that the Administrator lacks legal authority on account of insufficient power resources) to the initial

[78] 16 U.S.C. § 832c(a) (emphasis added)

[79] Petitioners' Brief, p. 16 and fn. 39; p. 23, fn. 72 and 74; pp. 35-36.

[80] Petitioners' Brief, pp. 35-36. (Bracketed language and emphasis in Petitioners' Brief.)

> contracts required to be offered under this Act will not be sustained. In obtaining new resources, however, BPA must do so in accordance with this bill. This provision does not override any other provision of this bill. To the extent that additional power is required to meet initial contract commitments, BPA can use its existing short-term authority as well as its authority under this Act.[81]

As pointed out in paragraph A above, when accurately read, this part of the House Commerce Report clearly explains Section 5(g)(7) as protecting only the act of offering the contracts from claims that the Administrator lacked sufficient resources to sell power. It does not protect specific contract terms that reverse statutory priorities.

5. a. The DSIs argue that Section 10(c) of the Regional Act[82] was enacted "to reassure preference customers in other regions who feared that the Regional Act — by mandating contracts for and committing power directly to nonpreference customers — would weaken their rights under federal power marketing statutes applicable to them."[83] They cite page 34 of the House Commerce Report in support of this claim.

b. Section 10(c) itself contains no such geographical limitation. The other Federal laws referred to in that section include the Bonneville Project Act,[84] the Flood Control Act,[85] and the Federal Reclamation Act,[86] all of which apply to the Pacific Northwest and BPA. Also, the House Commerce Report expresses no geographical limit on Section 10(c); in fact, the complete text of that portion of the Report says that Section 10(c) applies to the Pacific Northwest:

> Lastly, section 10(c) of the bill contains a disclaimer which flatly states that the bill does not "alter, diminish,

[81] H.R. Rep. No. 96-976 Part I, 96th Cong. 2d Sess. 64.

[82] 16 U.S.C. § 839g(c).

[83] Petitioners' Brief, p. 26, fn. 81.

[84] 16 U.S.C. § 832-832l

[85] 16 U.S.C. § 825s.

[86] 43 U.S.C. § 485h(c).

> abridge, or otherwise affect", either directly or indirectly, the preference provisions of other Federal laws. The Committee clearly intends no such construction of this Act by a court, Federal agency, or others that could affect in any way such provisions of law.
>
> The Committee believes that these and other safeguards adequately protect the preference clause and the long-held rights of preference customers in the Pacific Northwest and elsewhere.[87]

6. a. The DSIs argue that the Regional Act was passed to prevent BPA from allocating power according to preference administratively; they contend that Congress prevented such an allocation by reallocating power by statute.[88] They cite three passages[89] from the House Commerce Report in support of this contention.

b. All three passages from the House Commerce Report focus on the fact that the Regional Act grants BPA for the first time the authority to acquire resources to meet the needs of its customers. They make no reference to reversing the preexisting priority for access to any power, including nonfirm energy.

7. a. Both BPA and the DSIs argue that BPA's interpretation of the Regional Act is entitled to extra deference from this Court in part because of the role BPA played in helping Congress draft the statute.[90] To support this point, they cite pages from the Congressional Record containing the comments of Senator Hatfield and Representative Dingell on BPA's role.[91]

b. Both BPA and the DSIs fail to note that Senator Hatfield and Representative Dingell also expressed considerable appreciation for the role that public power played in drafting the Act and securing the consensus needed for its

[87] H.R. Rep. No. 96-976, Part II, 96th Cong. 2d Sess. 34-35 (1980)
[88] Petitioners' Brief, p. 34, fn. 101; p. 4-5, fn. 8; p. 35, fn. 103.
[89] H.R. Rep. No. 96-976, Part I, 96th Cong. 2d. Sess. 27-28, 31 and 36-37
[90] Petitioners' Brief, p. 46 and fn. 115; Federal Brief, p. 21, fn. 17.
[91] 125 Cong. Rec. S11,592 (daily ed. Aug. 3, 1979); 126 Cong. Rec. H9848-49 (daily ed. Sept. 29, 1980).

passage. Both Senator Hatfield and Representative Dingell specifically named the Public Power Council among the entities that lent technical assistance to Congress in the development of the Act's provisions. Accordingly, by the rationale of the DSIs and BPA, the Public Power Council's understanding of the Regional Act should also be entitled to deference.

8. a. BPA maintains that the Regional Act must have altered preference, because no legislation would have been needed had Congress merely wanted to leave preference intact.[92] In support of this point, BPA relies on the House Commerce Report.[93]

b. The cited passage from the Committee Report says nothing about changing priorities for nonfirm energy or limiting preference in any way. It discusses the new acquisition authority as the key feature of the Regional Act and describes how that authority will help BPA avoid the problems created by its previously limited power supply. The passage itself states plainly that one necessary feature of any solution to the region's energy problems is the preservation of preference unchanged.

9. a. BPA argues that Congress was fully aware that the Regional Act would change the quality of power whose allocation would be governed by preference rights in the Pacific Northwest.[94] To support this point, BPA cites the Senate report, S. Rep. No. 96-272, 96th Cong., 1st Sess. 28 (1980).

b. The Senate Report says nothing about preference, priorities of allocation, or nonfirm energy. The only pertinent portion of that page merely discusses how the restriction provisions of DSI service provide reserves for the region.

These nine examples demonstrate the DSIs' and BPA's attempt to rewrite the legislative history. In fact, as pointed

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[92] Federal Brief, pp. 24-25

[93] H.R. Rep. No. 96-976, Part I, 96th Cong. 2d Sess. 36 (1980).

[94] Federal Brief, p. 25.

out above, the legislative history echoes a plain Congressional intent to preserve preference.

CONCLUSION

For the reasons stated above the judgment of the Ninth Circuit Court of Appeals upholding the statutory priorities for the sale of BPA energy should be affirmed.

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